Supreme Court, U.S.
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No. 86-1608

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IVAN BULJUBASIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO
PETITION FOR WRIT OF CERTIORARI
PURSUANT TO RULE 22.6

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Petition for Writ of Certiorari was timely filed.

The Clerk of the United States Supreme Court has indicated there is an issue whether the Petition for Writ of Certiorari was timely filed. The purpose of this Supplement to the Court is to address that question.

The Seventh Circuit affirmed on January 7, 1987. Within fourteen days--on January 21, 1987--petitioner filed a Petition for Rehearing En Banc. Attached hereto as Exhibit 1 is the cover page of such Petition and the inside cover. This filing of the Petition for Rehearing En Banc was timely under Rule 40 of the United States Court of Appeals for the Seventh Circuit (formerly Circuit Rule 16). It also met the requirements of Federal Rule of Appellate Procedure Rule 35. The document was entitled "Petition for Rehearing En Banc."

On February 2, 1987, the United States Court of Appeals for the Seventh Circuit denied the Petition for Rehearing. This Petition for Writ of Certiorari was mailed to the Court with an appropriate affidavit of mailing pursuant to Rule 28

on April 2, 1987, and under the rules of this Court would be deemed timely filed.

An issue was raised by the Clerk of this Court because the Order of the Seventh Circuit denying the Petition for Rehearing, for some reason absolutely incomprehensible to counsel and to the clerking staff of the Seventh Circuit Court of Appeals, indicates that a suggestion for rehearing en banc (without a petition for rehearing) was filed. The order reads:

> "Defendant-appellant filed a suggestion of rehearing en banc (without a petition for rehearing) on January 21, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc. The suggestion of rehearing en banc is DENIED."

Federal Rules of Appellate Procedure, Rule 35(c) reads in part:

> "A suggestion for rehearing en banc must be filed within the time

> prescribed by Rule 40 for filing petitions for rehearing, whether the suggestion is made in such petition or otherwise."

The notes of the Advisory Committee on Appellate Rules, Federal Rules of Appellate Procedure, Rule 35 state at full paragraph three thereof:

> "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides."

Clearly, the filing involved here was in fact a Petition for Rehearing, with a suggestion that the case be reheard in

banc. The language of the Advisory Committee note makes clear that the inclusion of a suggestion in a Petition does not compromise the status of the underlying Petition for Rehearing. Counsel is not required, at his peril, to make a clear distinction between Petition and Suggestion, in order to retain the effect of the Petition.

Clearly, under the rules, and even more clearly under the Advisory Committee notes to Rule 35, a suggestion for rehearing can be made within a petition for rehearing. The order of the Seventh Circuit indicating that no petition for rehearing was filed is, in the face of the documents which were filed with the Clerk of the Seventh Circuit, an absolute misstatement.

This Court should not deem the language of the order denying the Petition to be the basis for finding that the Petition for Writ of Certiorari was not filed in adequate time.

Respectfully submitted,

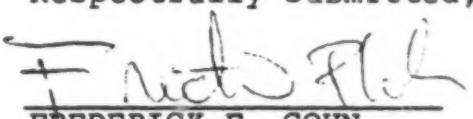

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EXHIBIT 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1263

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

IVAN BULJUBASIC,

Defendant-Appellant.

Appeal from the United States
District Court,
Northern District of Illinois,
Eastern Division.

Honorable Barbara Crabb, Presiding.

PETITION FOR REHEARING EN BANC

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1263

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

IVAN BULJUBASIC,

Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division.

Honorable Barbara Crabb, Presiding.

PETITION FOR REHEARING EN BANC

INTRODUCTORY STATEMENT

The reason this Court should order a rehearing en banc is because: (1) The Court of Appeals applied an inapplicable

standard--one applicable to a situation where the nature of the antagonistic defenses do not require a severance, to the situation here where a severance had to be and was granted and prejudice occurred to defendant because the district court did not grant the severance when prior to trial it was advised of the basis for the severance, but instead waited until after the